IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14165 of 2003
With
SPECIAL CIVIL APPLICATION No. 14158 of 2003
To
SPECIAL CIVIL APPLICATION No. 14172 of 2003
With
SPECIAL CIVIL APPLICATION No. 1858 of 2004
With
SPECIAL CIVIL APPLICATION No. 1865 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DIAMANT CARBON & GRAPHITE PRODUCTS LTD. - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AK CLERK for Petitioner(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 1,
MR TR MISHRA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 05/11/2004

COMMON ORAL JUDGMENT

1. This and other petitions are filed by the petitioner company challenging order dated 17.03.2003 – Annexure-H in Special Civil Application No.14165 of 2003 passed by the Assistant Labour Commissioner, Mahesana under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, “the ID Act). The Assistant Labour Commissioner was pleased to pass orders in the matters of individual labourers and referring the matter to Labour Court, Kalol to decide as to whether the individual workman be reinstated in service on his original post with arrears of pay or not.

2. All these matters are heard together, but Special Civil Application No.14165 of 2003 is referred as main matter.

Mr.A.K.Clerk, learned advocate appearing for the petitioner company submitted that in all these petitions, an identical issue falls for consideration, but then there is some variations on factual data of individual workman.

3. The facts giving rise to the present petitions are that the petitioner company floated a Voluntary Separation Scheme (hereinafter referred to as, “the

VSS"). A copy of the said VSS is produced at Annexure-A in Special Civil Application No.14165 of 2003.

Learned advocate for the petitioner company submitted that Clauses 6, 10, 14, 16 and 17 of the VSS are relevant and important Clauses for adjudication of the dispute. The same are reproduced for the ready reference:

> 6. The Company reserves its right to accept or refuse any application under the Scheme and such decision of the Company will be final and binding on the workmen and staff concerned, and no dispute shall be raised, if the application is accepted or rejected.
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> 10. Granting of permission of Voluntary Retirement under this scheme will be at the sole discretion of the Management and no employee can claim it as right to retire early, so as to claim the benefits available under this scheme.
>
> 14. The concerned workman will cease to be in the employment of the Company for all purposes and will not be eligible for any benefits other than the monetary benefits spelt out in the scheme.
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> 16. Once the Voluntary Retirement is opted by the workman, he cannot withdraw himself from the scheme.

17.An employee, who has ceased to be in the employment of the Company by virtue of his/her voluntary retirement under the scheme, shall not have any right to claim for re-employment or for employment of any other person or his relation any time in future in this Company or in any other Company or Concerned belonging to the same Management. In case, he/she makes any such claim, the same shall not be entertained by the Company".

It is the case of the petitioner company that 34 workmen voluntarily opted VSS and accepted monetary benefits flowing therefrom without any protest; that the petitioner company paid 100 days wages for every completed year of service by way of gratuity under the VSS in place of 30 days wages payable under the law (the Gratuity Act); but later on, some of the workmen raised a 'dispute' alleging that their services are terminated and claimed, 'reinstatement with full back wages'. The petitioner company appeared before the Conciliation Officer and pointed out that a VSS was offered as there was a settlement between the recognized union and the company; that the concerned workmen had accepted all the legal dues without any protest. Thus, there was no termination of service by the petitioner company and that being so, no 'industrial dispute' existed between the

parties. The petitioner company produced all the relevant documents before the Conciliation Officer.

4. The learned advocate for the petitioner company submitted that the Conciliation Officer submitted a failure report. Relying on that failure report, the appropriate Government passed the order under Section 10 of the ID Act and referred the matter for adjudication. That order is under challenge. The learned advocate submitted that the appropriate Government has erred in passing the order as from the material placed on record, it was clear that there was no industrial dispute in existence between the parties. The order of reference is, therefore, required to be quashed and set aside by this Court.

5. The learned advocate for the petitioner company submitted that the respondent workmen in all these petitions on voluntarily accepting the VSS, tendered their resignation and accepted all the benefits including the monetary benefits paid by the company flowing from the VSS. The learned advocate vehemently submitted that once the employee accepts the VSS, the relationship of employer and employee comes to an end. He submitted that once there is no existing relationship, no dispute can

exist. That being so, the order of reference could not have been passed by the appropriate Government, referring the matter to the Labour Court for its adjudication. The learned advocate for the petitioner company relied upon a decision of the Hon'ble the Apex Court in the matter of **BANK OF INDIA AND OTHERS VS. O.P.SWARNAKAR AND OTHERS**, reported in (2003) 2 S.C.C. 721.

The learned advocate submitted that it was held by the Hon'ble the Apex Court that the employee who accepted the ex gratia payment or any other benefit under the scheme, could not have resile therefrom. The learned advocate submitted that in the present case, the respondent workmen have not only accepted the ex gratia payment or 'some benefits' under the VSS, but have accepted 'full monetary benefits' flowing from the VSS and therefore, the respondents can not be allowed to resile from the VSS and no dispute be referred to the Labour Court for adjudication at their instance. The learned advocate submitted that in paragraph No.114 of the judgment of, the Hon'ble the Apex Court has observed as under:

> “However, it is accepted that a group of employees accepted the ex gratia payment. Those who accepted the ex gratia payment or any other benefit under the

Scheme, **in our considered opinion, could not have resined therefrom**".

The learned advocate for the petitioner company next relied upon a decision of the Hon'ble the Apex Court in the matter of **PUNJAB & SINDH BANK AND ANOTHER VS. S.RANVEER SINGH BAWA AND ANOTHER**, reported in (2004) 4 S.C.C. 484. The learned advocate submitted that the Hon'ble the Apex Court relying upon its earlier decision in the matter of Bank of India (supra), observed in paragraph No.5 as under:

> "In the case of *Bank of India v. O.P.Swarnakar* this Court observed that estoppel is based upon the acceptance and retention of benefits, by one having knowledge or notice of the benefit from a contract or a transaction. The doctrine of estoppel is a branch of the rule against the assumption of inconsistent positions. One who knowingly accepts the benefit of a contract is estopped from denying the binding effect on him of such contract. This rule has to be applied to do equity. It was accordingly held that those optees who knowingly received the payments and utilized them were not entitled to withdraw from VRS. In the case of *Punjab National Bank v. Virendra Kumar Goel* the applicant Bank submitted that some of the optees having accepted the benefits under VRS cannot be permitted to withdraw therefrom. In that matter, several review petitions were filed and in some of

those review petitions, it was found that the optees were aware of the credits in their accounts and they had even withdrawn the amounts deposited and had utilized the same and consequently, in such cases, **this Court did not permit the optees to withdraw from VRS**. To the same effect is the order passed by this Court in the case of *Bank of India v. Pale Ram Dhania*. In the light of the above judgments, we have to consider the fats of the present case."

The learned advocate then relied upon a decision of the Hon'ble the Apex Court in the matter of **PUNJAB NATIONAL BANK VS. VIRENDRA KUMAR GOEN AND OTHERS**, reported in (2004) 2 S.C.C. 193, which is referred in the matter of Punjab & Sindh Bank (supra).

The learned advocate for the petitioner company also relied upon a decision of the Hon'ble the Apex Court in the matter of **A.K.BINDAL & ANR. VS. UNION OF INDIA & ORS.**, reported in 2003 II CLR 535 and placed heavy reliance on the observations made by the Hon'ble the Apex Court in paragraph No.33 which reads as under:

"This shows that a considerable amount is to be paid to an employee as ex-gratia besides the terminal benefits in case he opts for voluntary retirement under the Scheme and his option is accepted. The amount is paid not for doing any work or rendering

> any service. It is paid in lieu of the employee himself leaving the services of the company or the industrial establishment and forgoing all his claims or rights in the same. It is a package deal of give and take. That is why in business world it is known as 'Golden Handshake'. The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period. If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the Scheme would be totally frustrated."

6. The learned advocate for the petitioner company next submitted that terms of reference contained in the order of reference passed by the appropriate Government dated 17.03.2003 at Annexure-H in Special Civil Application No.14165 of 2003 do not reflect the real dispute between the parties. He submitted that as the order of reference refers the dispute in the following terms:

"Whether the concerned workman should be reinstated in service with full back wages on his original post or not."

The learned advocate submitted that the dispute referred is on presumption that the services of the concerned workmen were terminated by the company. The learned advocate submitted that the order of reference is passed without taking into consideration the documents produced by the company on record before the Conciliation Officer which establish that the concerned workmen had tendered resignation after accepting the VSS and had received the monetary benefits flowing from the VSS without any protest. The learned advocate submitted that it is well settled position of law that the terms of reference must reflect the real dispute between the parties. He submitted that the real dispute between the parties as sought to be contended before this Court is that, 'VSS was not genuine one and was a fraud'. Now this aspect is no where reflected in the order of reference.

The learned advocate in support of his submissions relied upon the following decisions of the Hon'ble the Apex Court:

1. **POTTERY MAZDOOR PANCHAYAT VS. THE PERFECT POTTERY CO. LTD. AND ANOTHER**, reported in 1979 LAB I.C. 827 (S.C.).

2. **THE JAIPUR UDYOG LTD. VS. THE CEMENT WORK KARMACHARI SANGH, SAHU NAGAR**, reported in 1972-I-LLJ 427 (S.C.).

7. The learned advocate for the petitioner company next submitted that the petitioner company is constrained to approach this Court and challenge the order of reference because under the law, the Labour Court, to whom the dispute is referred, is bound by the order of reference and cannot examine the validity of the order of reference. The learned advocate submitted that it is only this Court under Article 226 of the Constitution of India can examine the validity of the order of reference on the ground of “non existence of industrial dispute”. In this regard, the learned advocate relied upon a decision of the Hon'ble the Apex Court in the matter of **NATIONAL ENGINEERING INDUSTRIES LTD. VS. STATE OF RAJASTHAN AND OTHERS**, reported in (2000) 1 S.C.C. 371. The learned advocate referred to paragraph No.24 of the judgment wherein the Hon'ble the Apex Court has held as under:

> “It will be thus seen that High Court has

> jurisdiction to entertain a writ petition when there is allegation that there is no industrial dispute and none apprehended which could be subject matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the industrial tribunal which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended appropriate government lacks power to make any reference.....”

8. The learned advocate for the petitioner company next submitted that the respondent workmen cannot be allowed to approbate and reprobate. He submitted that the concerned workmen having accepted the monetary benefits paid by the company under VSS, cannot raise a dispute. He submitted that in all these petitions all the concerned workmen have accepted the monetary benefits and hence, they cannot be allowed to raise the dispute. He submitted that with the payment of the amount, the relationship of employer and employee come to an end and once that happens, there is no question of any industrial dispute being in existence.

9. The learned advocate for the petitioner company submitted that under the VSS, 100 days wages for every completed year of service was paid, whereas under the law, it is only 30 days wages are required to be paid. He submitted that it is only at the instigation of other union that the respondent workmen have raised frivolous dispute. He submitted that such dispute ought not to have been entertained by the appropriate Government and the order of reference ought not to have been passed.

10. Mr.T.R.Mishra, learned advocate appearing for respondent workmen contested the matter by filing affidavit in reply. Patel Pareshkumar Amrutlal has filed affidavit in reply in Special Civil Application No.14165 of 2003. The learned advocate strenuously submitted that it is in the guise of VSS that the company has terminated the services of the respondent workmen. The learned advocate submitted that at the relevant time, Gujarat Mazdoor Panchayat was the union which was operating in the establishment and the employees were the members of the this union. He submitted that the company of its own floated VSS, a copy of which is on record. He submitted that no workman responded to the scheme. The workmen did not agree to submit their resignation and accept the benefit. It is only when the company created an

impression that the company is going to be closed down and all its activities are going to come to an end with effect from 31.12.2002, a settlement was arrived at under Section 2 (P) of the ID Act. There it was stated that the company for the reasons beyond its control will close all its activities effective from 31.12.2002. The union submitted the declaration of the employees that they voluntarily agree to severe of their relations with the company with effect from 31.12.2002. In turn, the company agreed not to 'retrench' the workmen and treat them as 'voluntarily retired'. The learned advocate submitted that this could be seen from the contents of Clause 9 of the settlement arrived at under Section 2(P) of the ID Act, which is at page No.15 of Special Civil Application No.14165 of 2003. It reads as under:

> “That in case any employee does not sign the declaration form he or she will be treated as retrenched from the services of the company and will be paid only the compensation and notice pay as per section 25 F of the Industrial Disputes Act, 1947 and other due payments as per law and such employees will not be entitled to any of the benefits of this settlement.”

The learned advocate for the respondent workmen submitted that it is evident from the aforesaid Clause that a direct threat was given to the workmen that in the

event the workmen does not sign the declaration, the workmen will be treated as 'retrenched' and will be paid retrenchment compensation as required under Section 25F of the ID Act. The learned advocate submitted that thereafter, the petitioner company placed a notice dated 20.12.2002 on the Notice Board wherein it was stated that if the employee did not opt for scheme, the management will be forced to pay 15 days retrenchment compensation as per law. The learned advocate invited the attention of the Court to last two paragraphs of the notice which read as under:

> “In case the employee do not opt for the Scheme, the Management will be enforced to pay only 15 (Fifteen) days Retrenchment Compensation as per Law per every year of completed service and one months notice pay.
>
> Hence we advise all the employees of the Factory to submit their Voluntary Retirement Scheme application in the prescribed form duly filed up in all respect and signed and hand over the same to the Union- namely Gujarat Mazdoor Panchayat immediately.”

The learned advocate submitted that thereafter, the company paid the amount under VSS on 31.12.2002. The learned advocate strenuously submitted that in view of the aforesaid facts, an important issue arises for

adjudication by the Industrial Tribunal that, 'whether the so called settlement between the management and the sole bargaining union was genuine and bonafide' and 'whether the workmen have voluntarily accepted the benefit' or 'they have subsequently changed their mind and raised an industrial dispute with dishonest intention' and whether 'the dispute raised is frivolous or not'.

11. The learned advocate for the respondent workmen submitted that according to the petitioner company, it was to close all its activities from 31.12.2002, but then company is still working. In this regard, the learned advocate invited the attention of the Court to 'wage slips' of two workmen for the month of January and February, 2003. He submitted that this shows that the company mis-represented the facts to the respondent workmen and made them to accept the VSS.

12. What is submitted by the learned advocate for the respondent workmen cannot be brushed aside. There is material. It appears to show that the company had represented to the respondent workmen that the company is going to be closed down and thus, made the respondent workmen to accept the VSS. It is also clear from the

wage slops which is at Annexures-E and F to affidavit in reply that the company is working. Thus, prima facie, there is substance in the submissions of learned advocate Mr.Mishra appearing for the respondent workmen.

13. Be that as it may, the settled position of law which emerges from the submissions of the learned advocate for the petitioner company and the decisions of the Hon'ble the Apex Court is that once the respondent workmen have accepted the monetary benefits, may be under mis-representation, their relationship of employer and employees comes to an end. That being so, until the respondent workmen restore the monetary benefits received by them to the company, they cannot argue that their relationship of employer and employees exists and they be allowed to raise an industrial dispute.

14. Besides, the order of reference does not reflect the aforesaid controversy between the parties. Mr.Mishra, the learned advocate for the respondent workmen, has in terms, stated in paragraph No.2 of the affidavit in reply as under:

> “..... issue in the present reference before the Industrial Tribunal will be **whether the so called settlement between management and the sole**

bargaining union was genuine and bonafide and whether the workmen have voluntarily accepted the benefit and subsequently changed the mind and raised their industrial dispute with dishonest intention and whether the dispute raised is frivolous or not?"

This particular aspect is not even remotely incorporated in the order of reference and therefore, the present petitions must succeed to that extent. The order of reference as it is, cannot be allowed to stand as it will be a futile exercise to allow the parties to agitate the dispute referred by the impugned order of reference. Even if the respondent workmen have a genuine, bonafide dispute, it cannot get adjudicated unless it is referred in specific term.

Under the agreement, format of which is produced on record at page No.19, which was to be signed by every workmen and subsequent undertaking signed by every workmen, a copy of one such undertaking as specimen is produced at page No.21, the VSS was affected and it was affected with the consent of the employees By that VSS, employer and employee relationship had come to an end.

For the reasons set out hereinabove, the petitions are allowed. The order of reference dated 17th March 2003

passed by respondent No.1 is quashed and set aside. However, in the interest of justice, it is clarified that it will be open for the respondents to raise a dispute that VSS was not a genuine one and was a fraud. Rule is made absolute with no order as to costs.

But then, it will be open to the respondents to raise a dispute only after the position as it prevailed before the petitioner company paid benefits of VSS is restored, i.e. the amount received by the respondents be paid back to the company. Once that is done then the respondents will be free to raise a dispute and pursue the same in accordance with law.

Looking to the peculiar facts of the case, this Court also recommends to the company that to facilitate the raising of a dispute, after the respondents return the amount paid to them under VSS, the company shall allow the workmen to withdraw their option accepting VSS. In that event, the company may terminate their services in view of provisions of Section 25Ff on account of transfer of undertaking. Once that is done, it will be open for the respondents to challenge that action/decision of the company in accordance with law.

(RAVI R.TRIPATHI, J.)

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